IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ALFRED SHORT — PLAINTIFF

VS. — CAUSE NO. 1:95CV359-D-D

CITY OF WEST POINT, MS and
RICHARD STRIPLING, Individually
and in his Official Capacity as
Fire Chief of the City of West Point — DEFENDANTS

MEMORANDUM OPINION

This cause comes before the court upon the motion of the defendants for summary judgment in their favor against the plaintiff's claims. The plaintiff has sued the City of West Point, Mississippi and Richard Stripling, individually and in his official capacity as fire chief of West Point, alleging violations of Title VII of the Civil Rights Act of 1964, the First Amendment to the United States Constitution, 42 U.S.C. §§ 1981 and 1983. Plaintiff's Complaint ¶ VIII. The defendants moved for dismissal or, in the alternative, summary judgment on the grounds that (1) this court lacks jurisdiction over the plaintiff's Title VII claims due to the plaintiff's failure to exhaust his administrative remedies; (2) the plaintiff's First Amendment claim should be dismissed because Title VII offers the exclusive remedy for retaliation for filing an EEOC claim; (3) the claims against defendant Stripling in his individual capacity have no factual basis; (4) the claims against defendant Stripling in his official capacity are duplicative since the City of West Point is a properly named defendant; and (5) the defendants are otherwise entitled to a judgment as a matter of law on all claims. The plaintiff has responded and this motion is ripe for determination.

FACTUAL BACKGROUND[1]

The City of West Point ("the City") hired plaintiff Alfred Short as a firefighter and an emergency medical technician (EMT) for the West Point Fire Department in January 1992. Although

[1]In a motion for summary judgment, the facts must be construed in the light most favorable to the non-moving party. Matagorda County v. Russel Law, 19 F.3d 215, 217 (5th Cir. 1994). The court's recitation of the facts in this case reflects this rule.

one of the qualifications for employment required firefighters to "[b]e a resident of Clay County and reside no more than three (3) miles outside the City Limits of West Point," the plaintiff resided in Macon, Noxubee County, Mississippi, when he began his employment with the City. Exh. 2 att. Short Depo., July 17, 1996. The City hired him with the understanding that he would soon move into Clay County. Short Depo., July 17, 1996 at 34.

In January or February of 1993, Short bought a house in the Northgate Subdivision of the City and moved into it in early spring of 1994.[2] Shortly afterwards, in April 1994, defendant Stripling replaced Caradine Young as Fire Chief for the City. In July 1994, an Engineer/ Pump Operator position opened at the fire department. The qualifications for this promotion were listed[3] and the plaintiff applied for the job. He sat for the written test and also participated in an oral interview.

Short scored the highest on the written exam out of the six applicants. Nevertheless, Chip Jones and Tony Lawson, white co-employees of the plaintiff and fellow applicants, were awarded the promotion in October 1994. The plaintiff filed a claim with the EEOC the first of November leveling a race discrimination charge against the City and Chief Stripling for failure to promote the plaintiff. The EEOC dismissed Short's claim of race discrimination on June 6, 1995, after finding that Jones and Lawson were more qualified due to the consideration of factors other than the written exam such as experience and job performance.

Even before the pump operator position opened up, Chief Stripling had been questioning the plaintiff about his living arrangements and his intention to comply with the residence requirements for firefighters of the City. The plaintiff claimed that he had moved into the house he bought in the

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[2]The defendants vehemently dispute this date and contend that neither Short nor his family ever resided in West Point until after the time relevant to this lawsuit. Defendants' Brief in Support of Motion for Summary Judgment at 5.

[3]Short testified by deposition that factors such as seniority and experience were not initially listed as weighing heavily in the promotion determination. Short Depo., July 17, 1996 at 47. However, he does not dispute that the final percentages allotted each factor were posted prior to the date of the written exam. Id. The applicant's written test score and his years of experience counted 70%, while leadership abilities and the oral interview accounted for the remaining 30%. Exh. 1 att. Stripling Aff., Oct. 4, 1996.

Northgate Subdivision on or around March 1994, even though his family still resided in their Macon dwelling. Defendant Stripling requested the police to investigate the matter and report back to him. Apparently dissatisfied with the reports, Dewel Brasher, the City's Chief Administrative Officer, wrote the plaintiff a letter of warning setting out the repercussions of failing to abide by the residence requirement. After meeting with the plaintiff in March 1995 to discuss the matter further, City Mayor Kenny Dill informed Short that he was suspended effective immediately and that the Mayor would recommend his termination to the City Board based on the plaintiff's abrogation of the residence requirement. Per such recommendation, the Board voted to terminate the plaintiff's employment on April 11, 1995. The plaintiff filed this cause of action on November 24, 1995.

LEGAL DISCUSSION

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); Vera v. Tue, 73 F.3d 604, 607 (5th Cir. 1996). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); Federal Sav. & Loan Ins. v. Krajl, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the party opposing the motion. Banc One Capital Partners Corp. v. Kniepper, 67 F.3d 1187, 1198 (5th Cir. 1995); Matagorda County v. Russel Law,

19 F.3d 215, 217 (5th Cir. 1994).

II. CLAIMS ADDRESSED

As an initial matter, the court addresses the matter of which of the plaintiff's claims are properly before it pursuant to the defendants' motion for summary judgment or dismissal. The plaintiff asserts that the defendants have moved for summary judgment only as to the retaliation claims and not as to any claim in regard to the failure to promote. Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 9. While the defendants' motion itself only references the retaliation claims, it is apparent from reading the defendants' supporting brief that the defendants intended their motion as one requesting dismissal of the entire case. Although the defendants apparently considered the plaintiff's complaint as only properly raising a retaliation claim, the defendants provided adequate notice to the plaintiff of their position that the plaintiff's Title VII claim of race discrimination for failure to promote is procedurally barred. Defendants' Brief in Support of Motion for Summary Judgment at 4 & n.3, 13 n.8. The court shall address this claim in addition to the plaintiff's retaliation claims. The defendants argue in their rebuttal brief that the plaintiff did not raise a § 1981 claim in his complaint for failure to promote. Although the plaintiff certainly highlighted his failure to promote claim as being brought under Title VII, the court is of the opinion that the plaintiff provided adequate notice of his intention to also state a claim under § 1981.[4] However, because the defendants did not move for summary judgment as to this claim, except in their rebuttal brief,[5] the court shall not address it.

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[4]Paragraph Eight of the Complaint provides:

> This Court has federal question jurisdiction under 28 USC 1343 to address claims under the Civil Rights Act of 1964, under the United States Constitution, Amend.1, under 42 USC Sec. 1981, and under 42 USC Sec. 1983.

Plaintiff's Complaint ¶ 8.

[5]Even if this court were to address the issue, the undersigned does not believe that the plaintiff's § 1981 claim is barred. The defendants contend that the § 1981 claim should be dismissed because

> "where the plaintiff has alleged violations of both Title VII and § 1981, the court as [a] rule, will consider an alternative remedy brought under § 1981 only if violation of that statute can be made out on grounds different from those

III. TITLE VII CLAIMS

A. Failure To Promote

It is undisputed that the plaintiff filed a charge with the EEOC on November 1, 1994, alleging race discrimination in regard to the City's and Chief Stripling's failure to promote the plaintiff. On June 6, 1995, the EEOC dismissed the charge and notified Short of his right to sue in federal court. Short had ninety (90) days from the receipt of his right to sue letter to file suit in federal court under Title VII for race discrimination in regard to his failure to promote claim. The plaintiff did not file suit until November 24, 1995 -- more than 90 days subsequent to the receipt of the EEOC notice.

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available under Title VII. . . . Plaintiff has raised no different grounds here. Accordingly, his § 1981 race claim . . . should be dismissed."

Defendants' Rebuttal Brief at 5. The Fifth Circuit, in Parker v. Mississippi St. Dep't of Pub. Welfare, stated that specific consideration of alternate remedies for employment discrimination (i.e., § 1983 and § 1981) is only necessary if a violation may be made out on grounds different from those under Title VII. 811 F.2d 925, 927 n.3 (5th Cir. 1987). However, the appellate court later clarified that language:

> In *Parker* we did no more than limit our appellate review of the denial of Title VII relief to the facts alleged in support of that claim, doing so because the claims alleged under Title VII and § 1981 were provable by the same facts. Thus a finding of liability or non-liability under one statute satisfied the other. . . . *Parker* does not stand for the proposition, nor could it properly do so, that a claimant alleging racial discrimination in an employment setting is limited to recovery under Title VII.

Hernandez v. Hill Country Tele. Co-op., 849 F.2d 139, 142-43 (5th Cir. 1988). The Hernandez Court cited the Supreme Court opinion of Johnson v. Railway Express Agency extensively. See 421 U.S. 454, 95 S. Ct. 1716, 44 L.Ed.2d 295 (1975). The plaintiff in Johnson had filed both a Title VII claim and a § 1981 claim. The Court noted that

> [d]espite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief. . . . [T]he remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of [42 U.S.C. § 1981] and the two procedures augment each other and are not mutually exclusive. . . .
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> We generally conclude, therefore, that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent.

Johnson, 421 U.S. at 459, 461, 44 L.Ed.2d 301, 302. The court will not bar the plaintiff's § 1981 failure to promote claim simply because the same claim under Title VII is procedurally barred when § 1981 itself contains no procedural prerequisites and is a valid and independent avenue for relief.

The plaintiff concedes this fact.[6] Plaintiff's Brief in Opp. to Mot. for Summary Judgment at 9 n.1. As such, the plaintiff is barred from bringing a claim for race discrimination under Title VII in regard to the defendants' failure to promote him. This claim of the plaintiff shall be dismissed.

B. Retaliation

In addition to a failure to promote claim under Title VII, the plaintiff has brought a retaliation claim under Title VII alleging the defendants fired him in retaliation to his filing a claim with the EEOC. The plaintiff did not file a claim with the EEOC regarding the allegedly retaliatory termination of his employment. As such, the defendants contend that this court lacks jurisdiction over the plaintiff's retaliation claim brought pursuant to Title VII.

Courts lack jurisdiction to consider claims under Title VII unless the aggrieved party has first exhausted his administrative remedies. Dollis v. Rubin, 77 F.3d 777, 781 (5th Cir. 1995); National Ass'n of Govern. Emp. v. City Pub. Serv., 40 F.3d 698, 711 (5th Cir. 1994); Clark v. Kraft Foods, Inc., 18 F.3d 1279, 1279 (5th Cir. 1994). The Fifth Circuit has recognized one exception to this exhaustion requirement that is relevant in the case at bar. In Gupta v. East Tex. State Univ., the appellate court held that

> it is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge; the district court has ancillary jurisdiction to hear such a claim *when it grows out of an administrative charge that is properly before the court.*

654 F.2d 411, 411 (5th Cir. Unit A Aug. 1981) (emphasis added); Barrow v. New Orleans S.S. Ass'n,

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[6] It appears the plaintiff concedes the dismissal of his Title VII failure to promote claim. Although aware of the defendants' position that the plaintiff's Title VII failure to promote claim is procedurally barred, the plaintiff failed to argue or present proof that the claim could proceed under the auspices of waiver or estoppel. Espinoza v. Missouri Pacific R. Co., 754 F.2d 1247, 1249 n.1 (5th Cir. 1985) (noting 90-day limit not jurisdictional, but subject to waiver and estoppel). Furthermore, as noted *supra* when addressing the jurisdictional question of this court's authority to entertain the plaintiff's Title VII retaliation claim, the plaintiff argued that the court has ancillary jurisdiction over the claim due to the plaintiff's § 1981 claim for race discrimination. The plaintiff failed to mention any Title VII claim for failure to promote to which a retaliation claim could attach itself. Plaintiff's Brief in Opp. to Mot. for Summary Judgment at 11. The court is of the opinion that the plaintiff had notice that the defendants were moving for summary judgment as to the Title VII failure to promote claim and that no genuine issue of material fact exists which precludes a ruling on this claim.

932 F.2d 473, 479 (5th Cir. 1991).

The plaintiff contends that "ancillary" jurisdiction is not the only avenue through which this court may properly entertain his retaliation claim. As neither Barrow nor Gupta explicitly stated that ancillary jurisdiction was the **sole** source of a court's authority over a retaliation claim not filed with the EEOC, the plaintiff takes the position that 28 U.S.C. § 1343 also provides this court with jurisdiction over such a claim. However, the plaintiff directs this court's attention to no authority for that proposition and the court's own research unearthed no such holding. Section 1343 merely grants district courts original jurisdiction over civil rights actions. However, 42 U.S.C. § 2000e-5(f) specifically confers upon district courts jurisdiction over Title VII claims. McMiller v. Bird & Son, Inc., 68 F.R.D. 339, 340 (W.D. La. 1975) (noting 28 U.S.C. § 1343 conferred jurisdiction over § 1981 claim while 42 U.S.C. § 2000e-5(f) conferred jurisdiction over Title VII claim). Section 1343 may not be used as an end run around the prerequisites for jurisdiction contained in Title VII. Otherwise, the court can discern no reason why Congress would include prerequisites such as those contained within § 2000e-5(f) if § 1343 could also bestow jurisdiction without the plaintiff complying with the listed requirements.

In the alternative, the plaintiff submits that this court has ancillary jurisdiction over his retaliation claim because the court has jurisdiction over his race claim under 42 U.S.C. § 1981. The § 1981 claim has no impact on this court's jurisdiction over the plaintiff's retaliation claim under Title VII. As the Gupta Court held and the Barrow Court subsequently reaffirmed, a district court has ancillary jurisdiction to hear a retaliation claim not filed before the EEOC "'when it grows out of an *administrative charge* that is *properly* before the court.'" Barrow, 932 F.2d at 479 (first emphasis added) (quoting Gupta, 654 F.2d at 414). This court interprets Gupta and Barrow as setting out the narrow holding that a retaliation claim not filed with the EEOC must attach itself to an otherwise properly filed Title VII claim in order for the court to have jurisdiction to hear it. The fact that race discrimination claims other than those filed pursuant to Title VII are properly before the court does not vest the court with authority over a retaliation claim not filed with the EEOC. As the court noted

supra, the plaintiff has no administrative charge properly before the court. Thus, this court has no ancillary jurisdiction to hear the plaintiff's Title VII retaliation claim and it shall be dismissed.

IV. FIRST AMENDMENT CLAIM

A. Title VII and § 1983

The defendants have moved for the dismissal of Short's First Amendment claim on the basis that Title VII provides the exclusive remedy for a retaliation claim. The plaintiff disputes this argument and submits that Title VII does not bar a separate claim under 42 U.S.C. § 1983[7] for violation of a constitutional right. In his Complaint, the plaintiff stated that

> Additionally, firing Plaintiff because he filed an EEOC charge violated his free speech rights and the right to petition the government for redress of grievances, protected by the United States Constitution, Amend. 1.

Plaintiff's Complaint ¶ IX. The defendants contend that "[a]lthough Plaintiff attempts to label these claims as First Amendment claims, they are essentially retaliation claims cognizable only under Title VII." Def.'s Brief in Support of Motion at 11. In support of this statement, the defendants cite several cases. See, e.g., White v. General Servs. Ad., 652 F.2d 913, 917 (9th Cir. 1981); Patel v. Derwinski, 778 F. Supp. 1450, 1457 (N.D. Ill. 1991); Washington v. United States Postal Serv., 1990 WL 119506 (N.D. Ill. 1990); Munoz v. Orr, 559 F. Supp. 1017, 1019-20 (W.D. Tex. 1983). Each of the cited cases, however, stand for the proposition that Title VII is a **federal** employee's exclusive remedy in this type of a situation. This court agrees that "[t]itle VII provides the exclusive remedy for employment discrimination claims raised by federal employees." Jackson v. Widnall, 99 F.3d 710, 715 (5th Cir. 1996) (citing Brown v. General Servs. Admin., 425 U.S. 820, 835, 96 S. Ct. 1961, 1969, 48 L.Ed.2d 402 (1976); Rowe v. Sullivan, 967 F.2d 186, 189 (5th Cir. 1992)). One of the

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[7] Section 1983 provides in relevant part that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

shortfalls of the defendants' argument is that Mr. Short was not a federal employee, but instead was employed by the City of West Point. See Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1575 (5th Cir. 1989).

The defendants' second shortfall is their misinterpretation of the recent Fifth Circuit opinion in Jackson v. City of Atlanta, Tx., 73 F.3d 60 (5th Cir. 1996). In that case, the court reaffirmed its holding in Irby v. Sullivan[8] that a "violation of Title VII cannot also support a § 1983 suit." Jackson, 73 F.3d at 63. The defendants read this language as precluding the plaintiff's First Amendment claim brought under § 1983. In Jackson, the basis for the plaintiff's § 1983 claim was the alleged violation of Title VII. Id. at 61 and 63. The court held that the § 1983 claim should be dismissed since § 1983 does not create any substantive rights itself but only provides a remedy for the violation of federal substantive rights and "§ 1983 is not available when 'the governing statute provides an exclusive remedy for violations of its terms.'" Id. at 63 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28, 101 S. Ct. 1531, 1545-46, 67 L.Ed.2d 694 (1981)). Because Jackson's § 1983 claim hinged on a violation of Title VII and Title VII provides an exclusive remedy for violations of its terms, the court dismissed the § 1983 claim.

Mr. Short's § 1983 claim does not hinge on an alleged violation of Title VII. Instead, the substantive federal right he submits the defendants infringed upon is his freedom of speech protected under the First Amendment. As noted by the Jackson Court, a plaintiff may

> pursue a remedy under § 1983 as well as under Title VII when the employer's conduct violates both Title VII and a *separate constitutional or statutory right*.

Id. at 63 n.13 (emphasis in original). The First Amendment sets out a constitutional right separate from what Title VII protects and the plaintiff is not precluded by Jackson from asserting a § 1983 claim under these facts.

B. Public Concern

In their rebuttal memorandum, the defendants assert in the alternative that the plaintiff's First

[8] 737 F.2d 1418 (5th Cir. 1984).

Amendment claim should be dismissed because the plaintiff's EEOC complaint does not involve a matter of public concern. As noted *supra*, the plaintiff alleges that the defendants violated his First Amendment rights by firing him in retaliation for his filing an EEOC complaint against them. As the plaintiff was a public employee at the time in question, the First Amendment only protects his speech if it involves a matter of public concern. Wallace v. Texas Tech. Univ., 80 F.3d 1042, 1050 (5th Cir. 1996). In determining whether certain speech falls into that protected classification, courts must look to the content, form, and context of the speech. Wallace, 80 F.3d at 1050 (citing Thompson v. City of Starkville, 901 F.2d 456, 461 (5th Cir. 1990)). If Short's speech was primarily in his role as employee as compared to primarily in his role as citizen, the speech generally is not of public concern. Id.

> The courts will not interfere with personnel decisions when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest.

Id. (quoting Page v. DeLaune, 837 F.2d 233, 237 (5th Cir. 1988); Connick v. Myers, 461 U.S. 138, 147, 103 S. Ct. 1684, 1690, 75 L.Ed.2d 708 (1983)).

After examining the plaintiff's EEOC charge of discrimination, it appears that this argument of the defendants may indeed have merit. See Ayoub v. Texas A & M Univ., 927 F.2d 834, 836-38 (5th Cir.), *cert. denied*, 502 U.S. 817 (1991). However, the defendants did not provide the plaintiff with notice of this basis for dismissal of the plaintiff's First Amendment retaliation claim. As pointed out *supra*, the defendants raised this issue only in their rebuttal brief. Thus, the court is of the opinion that the plaintiff should have an opportunity to respond to this matter and shall grant him additional time in which to do so before the court again takes up this issue.

V. CLAIMS AGAINST DEFENDANT STRIPLING

The defendants also submit that the claims against defendant Fire Chief Stripling in his individual and official capacities should be dismissed. The defendants argue that the official capacity claims should be dismissed because the City is a properly named defendant and such claims are merely duplicative. The plaintiff did not address this issue and the court finds this contention well taken and

shall dismiss the claims against defendant Stripling in his official capacity.

As to the retaliation claim against Chief Stripling in his individual capacity, the defendants submit that (1) the Chief did not make the recommendation nor the final decision of dismissal of the plaintiff, and in the alternative (2) Stripling, as a public official in Mississippi, is entitled to qualified immunity for discretionary acts which he performs in his official capacity as Fire Chief. The court is of the opinion that genuine issues of material fact exist which preclude the court from granting judgment as a matter of law as to the plaintiff's First Amendment retaliation claim against Stripling in his individual capacity. Although Stripling may not have participated in the final decision to dismiss the plaintiff, there appears to be a genuine issue of material fact as to whether Stripling's actions proximately contributed to the termination of the plaintiff's employment with the City. As such, Stripling is not entitled to a judgment as a matter of law as to the plaintiff's retaliation claim against him in his individual capacity. See Boddie v. City of Columbus, 989 F.2d 745 (5th Cir. 1993).

In the alternative, the defendants submit that Stripling is entitled to state law qualified immunity because any decisions relative to Short's employment were discretionary acts which Stripling performed in his official capacity. Stripling's claim of entitlement to state law immunity is unavailing as violative of the Supremacy Clause. Howlett v. Rose, 496 U.S. 356, 375-83, 110 L.Ed.2d 332, 353-58, 110 S. Ct. 2430 (1990) (finding state law immunities have no force in § 1983 suits "over and above" those provided in § 1983); see also Kimes v. Stone, 84 F.3d 1121, 1127 (9th Cir. 1996) ("Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law."); Goldberg v. Town of Rocky Hill, 973 F.2d 70, 75 (2d Cir. 1992) (same); Walker v. Norris, 917 F.2d 1449, 1458 (6th Cir. 1990) ("State law cannot provide immunity with regard to section 1983 claims."); Hufford v. Rodgers, 912 F.2d 1338, 1341 (11th Cir. 1990) ("[S]tate immunity . . . has no application to claims in federal court under section 1983."), *cert. denied*, 499 U.S. 921, 111 S. Ct. 1312, 113 L.Ed.2d 246 (1991). At this juncture, Stripling is not entitled to a judgment as a matter of law in his favor against the plaintiff's First Amendment retaliation claim.

VI. RETALIATION CLAIM AGAINST THE CITY

The defendants also assert that the City is entitled to summary judgment against the plaintiff's First Amendment retaliation claim. As with the claim against Stripling in his individual capacity, the court finds that genuine issues of material fact exist which prevent the entry of a judgment as a matter of law on this claim. To make out a *prima facie* case of retaliation, the plaintiff must demonstrate that: (1) he participated in a statutorily protected activity; (2) he received an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse action. Dollis v. Rubin, 77 F.3d 777, 781 (5th Cir. 1995). The defendants submit that the plaintiff has failed to create a material fact issue as to the third element of causation. However, in a summary judgment motion, the burden is initially on the movant to demonstrate that no genuine issues of material fact exist which preclude the entry of a judgment as a matter of law. The court is of the opinion that the defendants have not met their burden in this case. Short testified by deposition that defendant Stripling told him he was "digging a hole for himself" by filing with the EEOC and that Dewel Brasher, the City's Chief Administrative Officer, informed Short that the City was planning on talking with Short about his residence but refused to do so after he filed a claim. Short Depo., July 17, 1996 at 86, 88. These comments alone indicate that summary judgment is inappropriate at this time.[9]

VII. PUNITIVE DAMAGES

The final matter before the court is the argument by the defendants that the plaintiff is not entitled to punitive damages as a matter of law and this claim should be dismissed. Punitive damages are indeed recoverable under §§ 1983 and 1981. Smith v. Wade, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640, 75 L.Ed.2d 632 (1983); Hale v. Fish, 899 F.2d 390, 404 (5th Cir. 1990). However, the awarding of such damages is not available against a municipal defendant. City of Newport v. Fact

[9] The defendants further submit that they have articulated a legitimate nonretaliatory reason for their decision to terminate the plaintiff's employment, that being his alleged refusal to comply with the residency requirement. The court is of the opinion, however, that the plaintiff has demonstrated that genuine issues of material fact exist as to whether this reason is pretextual and whether his employment would have been terminated "but for" his protected activity.

Concerts, Inc., 453 U.S. 247, 267, 101 S. Ct. 2748, 2760, 69 L.Ed.2d 616 (1981) ("A municipality . . . can have no malice independent of the malice of its officials. Damages awarded for punitive purposes, therefore, are not sensibly assessed against the governmental entity itself."); Webster v. City of Houston, 735 F.2d 838, 860 n.52 (5th Cir. 1984); Walters v. City of Atlanta, 803 F.2d 1135, 1148 (11th Cir. 1986). As such, the plaintiff's punitive damages claim against the City of West Point shall be dismissed. The defendants also moved for summary judgment as to the punitive damages claim against Chief Stripling individually on state immunity grounds. However, as the court set out *supra*, state law immunity defenses are no bar to federal liability and Chief Stripling is not entitled to a judgment as a matter of law on this basis. The court declines to address the factual merits of the plaintiff's punitive damages claim against Stripling in his individual capacity because the defendants did not move for a judgment as a matter of law on this predicate. However, the defendants are entitled to summary judgment in their favor in regard to the punitive damages claim against the municipal defendant and those claims shall be dismissed.

CONCLUSION

The court finds the motion of the defendants for summary judgment partially well taken and it shall be granted in part and denied in part. The court is of the opinion that the plaintiff properly raised a claim under § 1981 in his Complaint and the defendants did not move for summary judgment as to this claim. As such, the court shall not address the merits of the plaintiff's § 1981 claim of failure to promote and it shall be allowed to stand. The defendants did provide adequate notice to the plaintiff of their position with regard to the plaintiff's Title VII claim for failure to promote and the court finds that this claim is procedurally barred and it shall be dismissed. As there is no administrative charge properly before the court to which the plaintiff's Title VII retaliation claim could attach, dismissal as to this claim is also proper. The defendants' argument against the survival of the plaintiff's First Amendment retaliation claim on the basis that the plaintiff's speech did not involve a matter of public concern appears to have potential merit; however, the plaintiff shall have an opportunity to respond to this matter before the court addresses it. As to the factual merits of the

plaintiff's First Amendment claim, the court is of the opinion that genuine issues of material fact exist which preclude granting a judgment as a matter of law in favor of the City or defendant Stripling on this claim. Finally, the City is entitled to a judgment as a matter of law as to the plaintiff's claim for punitive damages against it and this claim shall be dismissed.

A separate order in accordance with this opinion shall issue this day.

THIS ___ day of December 1996.

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ALFRED SHORT — PLAINTIFF

VS. — CAUSE NO. 1:95CV359-D-D

CITY OF WEST POINT, MS and
RICHARD STRIPLING, Individually
and in his Official Capacity as
Fire Chief of the City of West Point — DEFENDANTS

ORDER GRANTING IN PART MOTION FOR SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, the court upon due consideration of the defendants' motion for summary judgment finds the motion partially well taken and shall grant it in part and deny it in part. Therefore, it is ORDERED that:

1) the plaintiff's racial discrimination claim of failure to promote brought pursuant to Title VII is hereby DISMISSED. This order does not address the plaintiff's failure to promote claim brought pursuant to 42 U.S.C. § 1981.

2) the plaintiff's retaliation claim brought pursuant to Title VII is hereby DISMISSED.

3) the plaintiff's punitive damages claims against the municipal defendant City of West Point are hereby DISMISSED.

4) the claims of the plaintiff against defendant Richard Stripling in his official capacity are hereby DISMISSED as duplicative.

5) the plaintiff shall have fifteen (15) days from the date of this order in which to respond to the defendants' argument for dismissal of the plaintiff's First Amendment retaliation claim on the basis that the plaintiff's speech did not involve a matter of public concern. The defendants shall then have five (5) days in which to submit their rebuttal and the court shall take up this matter again after that time.

6) the remainder of the defendants' motion for summary judgment is hereby DENIED.

7) the court clerk shall file as part of the court record the defendants' memorandum brief

in support of their motion to dismiss or for summary judgment, the plaintiff's memorandum brief in opposition to the defendants' motion for summary judgment, and the defendants' rebuttal memorandum brief.

All memoranda, depositions, affidavits and other matters considered by the court in partially granting the defendant's motion for summary judgment are hereby incorporated and made a part of the record in this cause.

SO ORDERED this ___ day of December 1996.

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United States District Judge